

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Elimination of Experimental Broadcast Ownership) MM Docket No. 00-105
Restrictions.)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 5, 2000

Released: June 20, 2000

By the Commission:

Comment date: September 1, 2000
Reply Comment date: October 2, 2000

I. INTRODUCTION

1. By this Notice of Proposed Rule Making the Commission proposes to eliminate the multiple ownership rule for experimental broadcast stations which now provides that no entity may control more than one experimental license absent a showing of need. We seek comment on whether this rule remains necessary to achieve goals of competition and diversity in the broadcast market. The Commission stated in the Biennial Review Notice of Inquiry a tentative belief that this rule has a negligible impact on these goals and sought comment on whether this rule remains necessary in the public interest. The Biennial Review Report issued in that proceeding tentatively concludes that this rule may no longer be necessary. Accordingly, this Notice seeks comment on the repeal of § 74.134. Commenters advocating less than the outright repeal of the rule are encouraged to propose alternatives to the current restriction.

II. BACKGROUND

2. The multiple ownership rule for experimental broadcast stations was adopted in 1946 and generally limited ownership to one station. In 1963 this rule was redesignated as Part 74 (74.134)

1 47 C.F.R. § 74.134

2 Notice of Inquiry, In the Matter of 1998 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 13 F.C.C.R. 11276, 11293-94 (1998)(hereinafter "Notice of Inquiry").

3 Biennial Review Report, FCC 00-191 (adopted May 26, 2000), at para. 114.

with no changes. In 1984 the Commission combined Parts 74 A (Experimental TV), 74 B (Experimental Facility) and 74 C (Developmental Broadcast Stations) into the present subpart 74 A (Experimental Broadcast Stations) without changing the ownership limit.

3. By Section 202(h) of the Telecommunications Act of 1996,⁴ Congress directed the Commission to review its broadcast ownership rules as part of the biennial ownership review. That section requires the Commission to review its broadcast ownership rules biennially and to determine whether any of these rules are necessary in the public interest as the result of competition. Furthermore, it requires the Commission to “repeal or modify any regulation it determines to be no longer in the public interest.”⁵

4. Subpart A of Part 74 of the Commission’s Rules⁶ sets forth the rules for licensing “experimental broadcast stations,” which are defined as stations “licensed for experimental or developmental transmission of radio telephony, television, facsimile, or other types of telecommunication services intended for reception and use by the general public.”⁷ Experimental broadcast facilities are used to carry on “research and experimentation for the development and advancement of new broadcast technology, equipment, systems or services which are more extensive or require other modes of transmission than can be accomplished by using a licensed broadcast station under an experimental authorization.”⁸ The rules governing experimental broadcast stations encourage innovation while protecting existing services from interference. Licensees are subject to operating and reporting requirements and are prohibited from using the experimental broadcast facility in a commercial manner.⁹

5. Currently, § 74.134 states that “[n]o persons (including all persons under common control) shall control, directly or indirectly, two or more experimental broadcast stations unless a showing is made that the program of research requires a licensing of two or more separate stations.”¹⁰ As a result of the 1998 Biennial Review of our broadcast ownership rules we concluded that § 74.134 appears to no longer be necessary in the public interest. This *Notice of Proposed Rule Making* proposes the repeal of this limitation on ownership.

III. DISCUSSION

6. It appears that Section 74.134 was intended to limit experimental licensees to the minimum spectrum use necessary and to prevent them from aggregating a sufficient number of stations under the guise of experimentation to enable them to operate a commercial service on these stations. We believe, however, that other rules and requirements will adequately assure these ends and that the ownership limitation may, therefore, no longer be necessary.

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁵ Section 202(h).

⁶ 47 C.F.R. §§ 74.101 – 74.184.

⁷ 47 C.F.R. § 74.101.

⁸ 7 C.F.R. § 74.102.

⁹ 47 C.F.R. § 74.162 – 74.183.

¹⁰ 47 C.F.R. § 74.134.

7. Because licensees are prohibited from commercial use of experimental broadcast stations, such a licensee may not charge, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes.¹¹ Nor may it transmit program material unless it is necessary to the experiments being conducted, and no regular program service may be broadcast unless specifically authorized.¹² Several other sections of Subpart A help to ensure that stations licensed under this Subpart are used only for the experimental purposes for which they are intended. Supplementary reports are required with applications for license renewals¹³ and experimental licensees are required to make a satisfactory showing of compliance with the general requirements of the Communications Act of 1934, as amended.¹⁴

8. Thus, repeal of the multiple ownership rule would not appear to affect the Commission's ability to ensure that experimental stations are used solely for *bona fide* experimental purposes. Furthermore, because a license for an experimental broadcast station does not grant the exclusive use of a frequency, no licensee is able to control multiple frequencies.¹⁵ The Commission believes that these other sections of our experimental broadcast station rules provide sufficient protection to prevent entities from operating on a commercial basis while functioning under the guise of an experimental authorization. Since experimental broadcast facilities do not exert influence on the competitive market we believe ownership limits are unduly restrictive. Allowing a party to have more than one experimental broadcast station license, however, may permit efficiencies to be realized in the operation of such stations, permitting resources to be devoted to research more efficiently. This will promote the Commission's statutory charge to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."¹⁶

9. In the only comment filed in response to our Notice of Inquiry¹⁷ with regard to the instant rule, the National Association of Broadcasters (NAB) recommended repeal of this rule. It contended that broadcast auxiliary facilities are facing regulatory change and dislocation and, accordingly, there is now an even greater need for responsible use of experimental stations to develop solutions to these problems. NAB supported elimination of what it characterized as an "arbitrary restriction,"¹⁸ and urged the Commission to ensure that such stations do not endanger the interference-free service provided by broadcasters.¹⁹ We tentatively agree with the NAB's assessment of § 74.134.

10. Accordingly, we tentatively conclude that elimination of § 74.134 will have no adverse

¹¹ 47 C.F.R § 74.182(b).

¹² 47 C.F.R. § 74.182(a).

¹³ 47 C.F.R § 74.113.

¹⁴ 47 C.F.R § 74.131.

¹⁵ Id.

¹⁶ 47 U.S.C. § 303(g).

¹⁷ Notice of Inquiry, supra.

¹⁸ NAB Comments at 16.

¹⁹ Id. at 16.

impact on our diversity and competition goals. We also tentatively conclude that the protections afforded by our operations, non-interference, and reporting rules are sufficient to assure such stations are used for the purposes for which they are intended and use no more spectrum than needed. Accordingly, we believe that the multiple ownership rule governing experimental broadcast stations is no longer necessary in the public interest and propose its repeal. We invite comment on this matter.

IV. ADMINISTRATIVE MATTERS

11. Comments and Reply Comments. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 1, 2000, and reply comments on or October 2, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

12. Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment via e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

13. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

14. Parties who choose to file paper should also submit their comments on diskette. These diskettes should be addressed to: Wanda Hardy, Paralegal Specialist, Mass Media Bureau, Policy and Rules Division, Federal Communications Commission, 445 Twelfth Street, S.W., 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case (MM Docket No. 00-105), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 Twelfth Street, S.W., CY-B402, Washington, D.C. 20554.

15. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov. Comments and reply comments also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/df. Comments and reply comments are available electronically in ASCII text, Word 97, and Adobe Acrobat.

16. This document is available in alternative formats (computer diskette, large print, audio

cassette, and Braille). Persons who need documents in such formats may contact Martha Contee at (202) 4810-0260, TTY (202) 418-2555, or mcontee@fcc.gov.

17. Ex Parte Rules. This proceeding will be treated as a “permit-but-disclose” proceeding, subject to the “permit-but-disclose” requirements under section 1.1206(b) of the rules. 47 C.F.R. § 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description or the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

18. Initial Regulatory Flexibility Analysis. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis (“IRFA”) is contained in Appendix B. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared an IRFA of the possible economic impact on small entities of the proposals contained in this *Notice*. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the television broadcasting industry. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, and must have a distinct heading designating them as a response to the IRFA. The Reference Information Center, Consumer Information Bureau, will send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

19. Initial Paperwork Reduction Act Analysis. This *Notice* may contain either proposed or modified information collections. As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1996. Public and agency comments are due at the same time as other comments on the *Notice*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected; and (c) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W., Room C-1804, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward C. Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW, Washington, DC 20503 or via the Internet to Edward.Springer@omb.eop.gov.

20. Additional Information. For additional information on this proceeding, please contact Roger Holberg, Policy and Rules Division, Mass Media Bureau, (202) 418-2130, or Dan Bring (202) 418-2164, (202) 418-1169 TTY.

VII. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996, this *Notice of*

Proposed Rulemaking is ADOPTED.

22. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
Proposed Rule Changes

Part 74 of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 74 – EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES.

1. The authority citation for Part 74 is proposed to continue reading as follows:

Authority: 47 U.S.C. 154, 303, 307 and 554.

2. Section 74.134 is proposed to be amended as follows:

§ 74.134 [Removed]

APPENDIX B**INITIAL REGULATORY FLEXIBILITY ANALYSIS**

As required by the Regulatory Flexibility Act (“RFA”),²⁰ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above in paragraph 11. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the *Notice* and the IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

A. Need for, and Objectives of, the Proposed Rules

Section 202(h) of the Telecom Act requires the Commission to review its broadcast ownership rules every two years, beginning in 1998, and to “determine whether any of such rules are necessary in the public interest as the result of competition.” It instructs the Commission to repeal or modify any regulation it determines to be no longer in the public interest. In its first Biennial Report, issued as a result of Section 202(h) of the Telecom Act, the Commission tentatively determined that the experimental broadcast multiple ownership rule appeared to no longer be in the public interest. Accordingly, in compliance with the provisions of Section 202(h) of the Telecom Act, the Commission is commencing this proceeding in order to repeal or to examine the need to retain Section 74.134 of its Rules.

B. Legal Basis

This *Notice* is adopted pursuant to sections 1, 2(a), 4(i), 303, 307, 309, 310, of the Communications Act, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, 310, and Section 202(h) of the Telecommunications Act of 1996.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.²¹ The Regulatory Flexibility Act defines the term “small entity as having the same meaning as the terms “small business,” “small organization,” and “small business concern” under section 3 of the Small Business Act.²² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation;

²⁰ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

²¹ 5 U.S.C. § 603(b)(3).

²² *Id.* § 601(3).

and (3) satisfies any additional criteria established by the SBA.²³

Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."²⁴ Nationwide, as of 1992, there were approximately 275,801 small organizations.²⁵ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000."²⁶ As of 1992, there were approximately 85,006 such jurisdictions in the United States.²⁷ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.²⁸ Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

The Small Business Administration defines a radio broadcasting station that has \$5 million or less in annual receipts as a small business.²⁹ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.³⁰ Included in this industry are commercial, religious, educational, and other radio stations.³¹ The 1992 Census indicates that 96 percent (5,861 of 6,127) radio station establishments produced less than \$5 million in revenue in 1992. Official Commission records indicate that 11,334 individual radio stations were operating in 1992.³² As of September 30, 1999, Commission records indicate that 12,615 radio stations (both commercial and noncommercial) were operating of which 2,066 were noncommercial educational FM radio stations.³³ Applying the 1992 percentage of station establishments producing less than \$5 million in revenue (*i.e.*, 96 percent) to the number of radio stations in operation, (*i.e.*, 12,615) indicates that 12,109 of these radio stations would be considered "small businesses" or "small organizations."

The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5

²³ *Id.* § 632.

²⁴ 5 U.S.C. § 601(4).

²⁵ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

²⁶ 5 U.S.C. § 601(5).

²⁷ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

²⁸ *Id.*

²⁹ 13 CFR § 121.201, SIC code 4832.

³⁰ 1992 Census, Series UC92-S-1, at Appendix A-9.

³¹ *Id.* The definition used by the SBA also includes radio broadcasting stations which also produce radio program materials. Separate establishments that are primarily engaged in producing radio program material are classified under another SIC number, however. *Id.*

³² FCC News Release, No. 31327 (Jan. 13, 1993).

³³ FCC Press Release, Broadcast Station Totals as of September 30, 1999, (issued November 22, 1999).

million or less in annual receipts.³⁴ There are currently 1,243 commercial television stations and 373 non-commercial educational television stations on the air.³⁵ According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database, fewer than 800 commercial TV broadcast stations (65%) have revenues of less than \$10.5 million dollars. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-television affiliated companies. Accordingly, it appears that the proposed revisions would affect no more than 800 television stations that might be considered "small businesses" or "small organizations."

The *Notice* proposes to eliminate the bar on the ability of licensees to hold licenses for more than one experimental broadcast station. We seek comment and data regarding the number of small entities that may be affected by the proposed elimination of our experimental broadcast station multiple ownership rule.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

There currently are no recordkeeping or other compliance requirements associated with the subject rule. The *Notice* proposes no new recordkeeping or other compliance requirements.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

As indicated above, the *Notice* proposes to eliminate the subject rule and to allow licensees to have more than a single experimental broadcast license irrespective of their reason for seeking such multiple licenses. Significant alternatives were recently considered in the Commission's 1998 biennial review of its broadcast ownership rules (MM Docket No. 98-35). Those alternatives were: (1) retention of the current rule; (2) modification of the current rule; (3) elimination of the current rule. In that proceeding the Commission determined that elimination of the subject provision would be in the public interest. The Commission considered the results of this top-to-bottom review of the subject rule in its consideration of alternatives to the course proposed herein in the instant proceeding. Under the proposal in this *Notice*, small entities will be able to obtain multiple experimental broadcast station licenses, as will all broadcast licensees.

³⁴ 13 C.F.R. § 121.201 (SIC Code 4833)

³⁵ FCC Press Release, Broadcast Station Totals as of September 30, 1999, (issued November 22, 1999).

E. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.